THE OWNERS OF CARGO LATELY LADEN ON BOARD THE SHIP OR VESSEL "TA VEECHAI MARINE"

v.

THE OWNERS OF AND OTHER PERSONS INTERESTED IN THE SHIP OR VESSEL "TA VEECHAI MARINE"

HIGH COURT SABAH AND SARAWAK, SANDAKAN
TUAN IAN H.C. CHIN J
[ADMIRALTY IN REM NO. S(27)-2 OF 1991]
26 NOVEMBER 1994.

***MARITIME LAW**: Consignee accepting cargo despite discrepancies - Evidence admitted to resolve latent ambiguity - Limitation clause - Whether valid and can be relied upon by defendant.*

***TORT**: Conversion - Whether demand necessary - Cargo released without production of bill of lading - Whether plaintiffs entitled to sue for conversion - Whether plaintiffs to sue for goods sold and delivered.*

The plaintiff among others consigned 388 bundles of sawn timber (cargo) to Yong Swatt Wood Supply Co. Ltd. of Bangkok (consignee). The cargo was on 10 October 1991 loaded on the vessel "Taveechai Marine" (the vessel) at the port of Sandakan, Sabah. The vessel was owned by Poon Sri Sutharom (Poon Sri) who was also managing director of Tavee Thong Marine Co. Ltd. of Bangkok, the defendant, to whom the vessel was chartered to. The bill of lading was at the prompting of the plaintiff back-dated on 30 September 1991 instead of 10 October 1991, the true shipping date. The vessel arrived in Bangkok on 2 November 1991. It was only on 8 November 1991 that the bank in Bangkok informed the plaintiff that the consignee had rejected the shipping documents on the grounds that the shipment was late and the letter of credit had expired.

The cargo was discharged at midstream and taken to the godown of Sub Poon Tavee Warehouse Co. Ltd. of Bangkok (the warehouse). The plaintiff asserted that the defendant had in breach of duty and/or contract expressed in the bill of lading, and/or by their negligence delivered the 388 cargo to the consignee without production of the said bill of lading and had thereby converted the 388 cargo resulting in damage to the plaintiff in the sum of RM388,410.80 being the sale price of the 388 cargo. The dispute resulted in the arrest in Sandakan of the vessel on 18 December 1991 at the instance of the plaintiff. The defendant counter claimed for damages for wrongful arrest of the vessel.

Held:

[1] Clearly, the documents emanating from the consignee show that the consignee was prepared to accept the 388 cargo. This means that the consignee agreed to accept the discrepancies in respect of the 388 cargo, that is accepting the 388 cargo though it was shipped late and though the letter of credit had already expired. That was the intent of the exchanges by the telex (P13) and the fax (P14).

[2] A demand for the return of the 388 cargo is not necessary in this case it is the plaintiff's assertion that the defendant is no longer in possession of the 388 cargo and that the 388 cargo was already delivered to the consignee resulting in the plaintiff being in a position to exercise an option either to sue the defendant for conversion or the consignee for goods sold and delivered.

[3] The defendant had delivered to the consignee the 388 cargo without the production of the bill of lading or a guarantee for payment in lieu thereof. The consignee was only entitled to take delivery if he had obtained the bill of lading which entails accepting liability to pay for the 388 cargo and which payment will be by way of the letter of credit which had already been opened by the consignee in favour of the plaintiff. Until the consignee agrees to accept the bill of lading and thus agrees to pay, the 388 cargo should not be delivered to the consignee unless the consignee produces the bill of lading. In delivering the 388 cargo to the consignee when the consignee was not entitled to take delivery of them because the consignee did not produce the bill of lading, the defendant was guilty of conversion.

[4] All the evidence points to the facts that the 388 cargo was delivered from midstream and that the consignee arranged for vehicles to carry the 388 cargo to the warehouse which was completely under the dominion and control of the consignee. The photographs produced in Court support the conclusion that the consignee was already dealing with the 388 cargo since some of the bundles were already broken up and mixed with the 493 cargo and lorries were seen carrying away the sawn timber. The evidence, therefore cannot support the contention of the defendant that the 388 cargo was at that time and is still being safeguarded by the defendant.

[5] Limitation must surely have been intended by the parties and the clause must therefore be given its plain and ordinary meaning. Since the limitation is not a clause excluding all liability it cannot be regarded as unreasonable or as counter the object or intent of the contract. The limitation is valid and if is does apply it means the amount of damages recoverable by the plaintiff would be only be the sum of RM329,800. But the operative words for this clause to apply are: "So long as the goods remain in the actual custody of the carrier of his servants". The 388 cargo was no longer in the actual custody of the defendant nor with the their servant. The 388 cargo was in fact already delivered to the consignee. Hence this clause cannot be called upon the defendant to limit its liability.

[Plaintiffs claim allowed with costs to be taxed. Defendants counter claim dismissed]

Cases referred to:
Great Western Railway v. Bristol Corpn. [1918] 87 LJ Ch. 414 at p. 42 ***(foll)***
Si Khiong Industries Sdn. Bhd. v. Liau Shu Chau (Trading as Syarikat Maju Jaya Agency) [1993] 1 AMR 779; [1993] 4 CLJ 468 ***(not foll)***
Abdul Muthalib bin Hassan v. Maimoon bte Haji Abd. Wahid [1992] 1 CLJ 88 ***(dist)***
Clayton v. Le Roy [1911] All ER 284 ***(refd)***
Bond Corp. NV v. Brook [1974] 40 DLR (3rd) 418 ***(refd)***
Verschures Creameries Ltd. v. Hull and Netherlands Steamship Company Ltd. [1921] 2 KB 608 ***(foll)***
Sze Hai Tong Bank Ltd. v. Rambler Cycle Co. Ltd. [1959] AC 576 ***(not foll)***
Ailsa Craig Fishing Co. Ltd. and another [1983] 1 All ER 101 ***(refd)***

Legislation referred to:
Merchant Shipping (Implementation of Convention Relating to Carriage of Goods by Sea and To Liability of Shipowner & Other) Regulations 1960, Art. IV, reg. 2 (g)
Evidence Act 1950, ss. 45, 78(1)(f)

Other sources referred to:
Lewison on Interpretation of Contracts, p. 161, para. 7.05
Sarkar on Evidence, 14th Edn., p. 237
Cleark & Linsell on Torts, 17th Edn., p. 645, para. 1091 & p. 646, para. 1094
Halsbury's Laws of England, 4th Edn., Vol. 45, para. 1422, 1430
Palmer on Bailment, 2nd Edn., p. 213
Julian Cooke & Ors. on Voyage Charters, p. 142

Chitty on Contracts, 26th Edn., Vol. 1, para 943
Carver's Carriage By Sea, 13th Edn.; Vol. 1, p. 97, para. 129

For the plaintiff - Edwin Tsen; M/s. Tan Pang Tsen & Co.
For the defendant - Kathryn Leong (Raymond Wong and Anthony Shim with her); M/s. Chin Wong & Shim.

JUDGMENT

Ian H.C. Chin J:

Introduction

This action, taken out on 14 December 1991 and after two parties-induced aborted trials, was finally heard on 24, 25, 26, 27, 28 and 31 October 1994 whence I reserved judgment to today. The trial was at one stage interrupted by power cuts forcing the Court to hold part of the trial at a local hotel which has its own electricity generator and such a measure was necessary to avoid postponement and because the witnesses are mainly from Singapore and Thailand. In fact, the trial continued in the hotel even though the power was restored in order not to be again interrupted by unscheduled power cuts which was experienced in the course of the trial. Another reason for the trial to continue at the hotel was because it was so much more comfortable and quiet compared to the Court house.

The dispute revolves around the delivery of one consignment of 388 bundles of sawn timber ("the 388 cargo") which, among others, was consigned by the seller Weeluk (S) Pte. Ltd. of Singapore ("the plaintiff") to Yong Swatt Wood Supply Co. Ltd. of Bangkok ("the consignee") and the 388 cargo, among others, was on 10 October 1991 loaded on the vessel "Taveechai Marine" ("the vessel") at the port of Sandakan, in the State of Sabah, Malaysia. The vessel was owned by Poon Sri Sutharom ("Poon Sri") who was also the managing director of Tavee Thong Marine Co. Ltd. of Bangkok ("the defendant") to whom the vessel was chartered. The vessel arrived in Bangkok on 2 November 1991 and the 388 cargo was discharged at midstream and taken to the godown of Sub Poon Tavee Warehouse Co. Ltd. of Bangkok ("the warehouse"). The dispute resulted in the arrest in Sandakan of the vessel on 18 December 1991 and at the instance of the plaintiff.

The Pleadings

The plaintiff asserts that the defendant had in breach of duty and/or contract expressed in the bill of lading, and/or by their negligence delivered the 388 cargo to the consignee without production of the said bill of lading and had thereby converted the 388 cargo resulting in damage to the plaintiff in the sum RM388,410.80 being the sale price of the 388 cargo. The defence was summarised in the opening statement of their Counsel, Ms Kathryn Leong, in these terms, *viz*:-

1. The plaintiff's 388 cargo was never delivered to the consignee but are still lying in the warehouse with the plaintiff refusing to take delivery of the cargo despite repeated request by the defendant and thus there was no conversion of the plaintiff's 388 cargo.

2. The plaintiff's 388 cargo was discharged in accordance with the customs of the Port of Bangkok and pursuant to the terms and conditions of the contract of carriage as evidenced by the bill of lading No.002 dated 30 September 1991.

3. The plaintiff's loss is solely attributable to their own act or omission in that they were in breach of the sales contract with the consignee resulting in the consignee rejecting the 388 cargo.

4. The defendant maintains their liability are limited to the extent as laid down by the Merchant Shipping (Implementation of Conventions Relating to Carriage of Goods by Sea and to Liability of Shipowner & Other) Regulations 1960.

The defendant counterclaims for damages for wrongful arrest of the vessel.

The Plaintiff's Evidence

David Wong, the managing director of the plaintiff, testified that the plaintiff entered into a sales contract with the consignee on 21 February 1991 (D2(a))for 2200 tons of 50 cubic feet of sawn timber of various specie and sizes. The relevant terms of this sales contract are:

(1) that payment is by 90 days letter of credit;

(2) that shipment is to be made in March/April 1991; and

(3) that partial shipment is allowed.

In pursuance of this sales contract, the consignee on 15 March 1991 caused to be issued for the benefit of the plaintiff a letter of credit for RM2.2 million with 15 June 1991 as its expiry date and with a stipulation that the shipment must be made by the latest, 31 May 1991. The shipment date was extended to 31 July 1991 while the expiry date of the letter of credit was extended to 15 August 1991. According to David Wong, he had on 15 August 1991 telexed Pornchai Larppracha ("Pornchai"), the owner of the consignee, to extend the letter of credit for the 388 cargo. This telex (P13) reads:

RE: L/C 341011/02561 (OLD CTR 020/90)

We CFM loading the balance qty of the abv ctr on mv mighty commond. Vssl eta Sabah 20/8. Could you please extend L/C until 15 October 1991 to enable us to proceed. Kindly fax copy of amendment as soon as you have done.

The consignee replied by facsimile (P14) on the same day in the following terms:-

RE: L/C 341011/02561. Your telex WLK 7749

As our previous telecon, the L/C has been extended once, so it is unconvenient to extend again. The further shipment, please present the disrepancy of the expiry date through your banker to our banker for us to sign acceptance.

David Wong maintained that by the said exchanges just referred to, the consignee had agreed to a late shipment of the 388 cargo which was thereafter loaded on the vessel on 10 October 1991 and the plaintiff immediately telexed (P15) the consignee this fact in the following terms:

Loaded your 500 tons of Balau together with balance order of last contract on MV T Chai Marine. Copies of s/does DHL to you TFY via DHL ref no. 155805355

The shipping documents relating thereto consisting of the invoice, packing list, grading summary, certificate of origin and a copy of the bill of lading were also on 10 October 1991 courier despatched to the consignee. According to David Wong, the consignee responded by fax (P16(a)) and asked the plaintiff to prepare a grading summary in the format the consignee had set out in 3 copies of the summary which were sent by facsimile together with the facsimile P16(a). The grading summary proposed by the consignee included details for the 388 cargo. The 388 cargo was shipped together with another consignment of 493 bundles of sawn timber ("the 493 cargo"), both of which were sold to the consignee. The bill of lading was at the prompting of the plaintiff back-dated to 30 September 1991 instead of dating 10 October 1991, the true shipping date. The vessel arrived in Bangkok on 2 November 1991. It was only on 8 November 1991 that the bank in Bangkok informed the plaintiff that the consignee had rejected the shipping documents. David Wong claimed that he caused to be sent on 14 November 1991 a telex (P19) to the defendant's Sandakan agent Finego Enterprise Sdn. Bhd. ("the agent") asking the agent, to quote, "whether goods have been delivered to the consignee or not". But this telex (P19) reads:

a We yet to receive payment from our buyer for the abv bill. Kindly telex BKK owner or agent and check whether has consignee submit any banker guarantee to exchange with the delivered order. Pls revert ASAP.

According to David Wong, the agent, after a reminder telex (P21), replied by telex on 18 November 1991 (P20) to say as follows:

b Ref to YTLX WLK8207 + 8216 - V HV on 15/Nov Tlx our PPL requesting the findings in respect of the ABV unpaid consignment. Similar reminder was again sent tdy n upon receiving their response, V SH IMMDTLY RVT U.

David Wong then on 21 November 1991 flew to Bangkok and met Pornchai. As for this meeting in Bangkok, David Wong's evidence are in these terms:

c I went to Bangkok on 21 November 1991. In Bangkok Mr. Pornchai came to my hotel and took me to see the timber at his rented warehouse. When I was at that warehouse, I saw a lot of the timber for the 388 bundles and the 493 bundles have already been broken loose and there were lorries taking delivery of part of the loose timber. I asked Mr. Pornchai whether he had issued any banker's guarantee to release the 388 bundles. He said "No". He said that he had only carried a banker's guarantee for the 493 bundle and if I want payment to be made by him, I have to give him 50% discount. I did not agree with him. After I came back to the hotel, I called by telephone to Madam Poon Sri and checked with her whether she had d received any banker's guarantee before she released the cargo to Yong Swatt. She told me she had. On 25 November 1991 I flew back to Singapore. When I return to Singapore I sent a fax to owner's agent in Sandakan.

The facsimile (P23) that he sent to the agent on 25 November 1991, referred to in the just quoted evidence, reads:

e RYT FG 11259 We understand from owner Mdm Poonsri that consignee have given the bankers guarantee. Pls ask the owner the fax copy of the bankers guarantee to our S'pore fax 5380002 today. Pls treat this matter as urgent.

The agent was said to have replied by a telex (P22) on the same day which telex says:

f Ref yfax of tdy re b/g supposedly revd by Mdm. Poonsri, V HV Tlx Advd owner requesting same to be furnished u accdgly.

David Wong also sent another fax to the agent on 25 November 1991 (P24), the chronological order of which was not explained, and it says:

g Enclosed is your invoice WL/910308.SDK. For your information the consignee wants to deduct 50% of this amount as claim due to falling market in Bangkok which we have refused to accept.

This exchange of telexes and facsimiles were followed by two letters issued by the plaintiff, dated respectively 26 November 1991 and 29 November 1991 and both addressed to the plaintiff's banker in Singapore. The first letter, after stating that the consignee had obtained the delivery order from the defendant and had obtained delivery of the 388 cargo, asked the bank to request the Bangkok bank to get the consignee to pay for the cargo. The second h letter asked for the return of the original shipping documents. The plaintiff continued with its paper assault on the agent issuing one facsimile and one telex in quick succession, the former on 3 December 1991 and the latter a day later, and they are in these terms:

Facsimile dated 3 December 1991:

i Up till now we still have not received the banker's gurantee which you supposedly requested the owner to fax to us. We understand that this cargo have been released to the consignee by the owner without any banker's gurantee. Please confirm the final status and position of the cargo of this b/l by return fax today.

Telex dated 4 December

> Pls kindly reply our fax to confirm cargo release to consignee already.

The agent responded on 5 December 1991 stating as follows:

> Fther ytlx 8291 - v hv in fact sent numerous fax to Tavee Thong Bkk seeking their firm answers in respect of the b/g in question n regretfuly adv, they have resonded us todate.
>
> What v hv revd ystdy was the faxed pictues of CGOS (encld) purportedly to be the b/l CGOs now being stored at Yong-Swatt Wood supply go-down apprc. yr. comments.

The pictures referred to in the fax were 4 in number showing sawn timber and the paper on which the pictures were placed contained the following words typed on different locations of the page:

> To Finego Enterprise Sdn. Bhd.
>
> FM Tavee Thong Marine Co. Ltd.
>
> Re: S/Timber
> B/L No. SDK/BKK:
> At Godown Yong Swatt Wood Supply
> For yr. reference
>
> B-Rgds
>
> Mdm Poonsri

Going back to the trip to Bangkok on 21 November 1991, David Wong also alleged that while there he saw the 388 cargo mixed up with that of the 493 cargo. It was in this meeting that Pornchai told him that the shipping documents had been rejected. The writ was issued on 14 December 1991 and the vessel arrested on 18 December 1991. More of the evidence for the plaintiff will be adverted to when I consider the conflict in the evidence of the parties. I will now turn to the evidence for the defence.

Defence's Evidence

Pornchai testified that the consignee entered into the contract (D2) with the plaintiff for the sale and purchase of the 388 cargo. That it was a term of the contract that the cargo be shipped in March/April 1991 and that payment was by 90 days letter of credit. The Letter of Credit was by consent amended (D6) to allow shipment by 31 July 1991 and its expiry date extended to 15 August 1991. He testified that on 24 October 1991 the consignee received an advice from the Bangkok bank, the relevant part of which says:

> Re: Draft for RM388,410.80
> **drawn under our L/C 341011/02561**
>
> Please note that we have just received the subject draft and relative shipping documents from United Overseas Bank Ltd., Singapore Ref No. CBP TTT 11201627.
>
> On examining them, we found the following discrepancy/oes:
>
> 1. L/C expired
>
> 2. Late shipment.
>
> I.P. 34/10681
>
> In the event that you are agreeable to letting them negotiate draft/s drawn on you with the said discrepancy/ies and/or condition Please sign and return to us the attached acknowledgment

copy of the letter. Alternatively, we shall appreciate your informing is if it is not feasible for you to entertain this request.

The consignee replied, using the enclosed form, and rejected the shipping documents and draft because of the discrepancies, that is, the expiry of the letter of credit and the late shipment. Pornchai testified that the telephoned David Wong about the rejection and that it was in this telephone conversation that David Wong told him he would be coming to Bangkok. He also testified that he told an official of the defendant and Poon Sri of the rejection of the documents. At about the time of the arrival of the vessel at Bangkok, he paid the customs duties for the cargo together with other dues as requested by Poon Sri. This amounted to 341,065 Baht which is about the Ringgit equivalent of RM41,000. He also explained that if the dues were not paid his 493 carge cannot be unloaded from the vessel. As for the 388 cargo being mixed-up with that of the 493 cargo, he explained that there was not enough space in the godown and that the photographs produced in Court show the sorting of the timber from the 493 cargo for the purpose of their sales. As for the meeting with David Wong, he alleged that David Wong had asked him to accept the 388 cargo but that he refused because the agreement had expired. He admitted asking for a reduction of 50% in the price. He said he had asked David Wong to take the 388 cargo back. Since David Wong did not agree to the 50% reduction in price, he asked David Wong to look for another buyer. As for the proposed grading summary (P16(b), (c) and (d)) which were sent to the plaintiff, he maintained that the details for the cargo were mistakenly included by his employee as it should have only included details for the 493 cargo. He denied that he had agreed to accept the 388 cargo and to accept discrepancy through the exchanges of P13 and P14.

Poon Sri who was 86 years old came all the way from Bangkok and gave evidence from a wheel-chair. After she was informed that the cargoes had been loaded in Sandakan she called the consignees, including the consignee, to ask them to pay all the dues on the cargoes so that the cargoes can be unloaded quickly. She alleged that Pornchai told her that he would not pay for the 388 cargo but only the 493 cargo as the letter of credit has expired. She denied that David Wong called her over the telephone when he was in Bangkok on 21 November 1991. She denied that the defendant had sent the facsimile containing the photographs (P29(b)). She maintained that the 388 cargo was delivered to the warehouse after the consignee had rejected them.

Another witness who testified for the defence was Samrit Sookgaree, the Deputy Director of the Cargo Operation Department of the Port Authority of the Port of Bangkok. He testified that timber cannot be unloaded onto the wharf but can only be discharged overside at midstream. He also testified that the customs duties on all the cargoes must be paid before any cargo can be discharged. A final witness for the defence was Thamnoon Nitsawaeng, an employee of the defendants but his testimony was in relation to matters which were well documented and which documents were already produced.

I have set out the salient points in the evidence of both parties. Determining what really is the truth in this case will be the immediate task and the resolution of this issue would in turn determine the relevant laws to be applied. With that remark, I will proceed to set out my findings and my reasons therefor.

Findings of Fact.

The first of the issue is whether the telex (P13) and fax (P14) both exchanged on 15 August 1991, can be construed to mean that the consignee had agreed to accept the 388 cargo despite the late shipment and despite the expiry of the letter of credit. (D3). For this exercise, the surrounding circumstances leading to the said exchanges must be looked at. It was not certain

whether the 388 cargo was the last of the 2,200 tons consignment agreed under the contract (D2) though there had been previous shipment under this contract (D2). There was still a standby credit of RM2.2 million made available by the consignee for the plaintiff but which had expired. The 388 cargo, weighing only 289.8588 tons of 50 cubic feet (see the bill of lading D10 and invoice P6) only constituted a small part of the total consignment of 2,200 tons under the contract (D2). But it appears from the wordings used in the telex (P13) that the 388 cargo may be the last of the consignment due under the contract (D2) because it talks about "the balance quantity". It is also not in dispute that despite the expiry of a letter of credit and despite non-compliance with the terms therein, the consignee can waive the discrepancies, that is, disregard the late shipment and the expiry of the letter of credit, by accepting the shipping documents. It is common ground that there were late shipment before and these were accepted by the consignee. It is also common ground that the request for the extension of the letter of credit was refused by the fax of the consignee (P14) for the reasons, as stated in the fax, that the letter of credit had already been extended several times and it was inconvenient to further extend it. It was the next sentence of the fax (P14) that gave rise to the contention and it reads: "The further shipment, please present the discrepancy of the expiry date through your banker to our banker for us to sign acceptance." The plaintiff contends that those words refer to the 388 cargo. Though Ms Kathryn Leong, Counsel for the defendant, initially maintained through questions put to David Wong that those words refer to other shipment other than the 388 cargo, she later on, at the defence stage of the case, made a statement that she was wrong in asserting that. If there was, than the said words could possibly refer to future shipment other than the 388 cargo which the consignee has by the fax (P14) agreed to accept despite the late shipment and the expiry of the letter of credit. Since there was no evidence from either side as to whether there is any balance of timber to be shipped under the contract (D2) after the shipment of the 388 cargo, the words could apply to either the 388 cargo or to future shipment other than the 388 cargo. When such a situation is obtained it is generally regarded as a latent ambiguity for which further evidence is admissible to resolve the ambiguity. This was what was said by Lord Wrenbury in *Great Western Railway v. Bristol Corpn*. [1918] 87 LJ Ch.414, at p.429, regarding latent ambiguity, *viz*:

> The words of the instrument may be perfectly plain and unambiguous - for example 'My nephew, Joseph Grant' or 'fair market price', but if, from the surrounding circumstances, when you come to apply the instrument, you find that there are two persons who will satisfy the words 'my nephew Joseph Grant', or two markets to which the parties may have been referring, there is latent ambiguity, and evidence is admissible to resolve it. Extrinsic evidence has created the ambiguity, and extrinsic evidence is admissible to resolve it.

Any evidence, including direct evidence of the intention of the parties, is admissible to resolve a latent ambiguity (**Lewison on Interpretation of Contracts,** p. 161, para. 7.05) This leads me to consider the subsequent exchanges of telex (P15) dated 10 October 1991, and facsimile (P16), dated 12 October 1991, between the plaintiff and the consignee, both of which I have already reproduced earlier. The telex (P15) sent by the plaintiff to the consignee speaks of the timber being loaded on the vessel and of the copies of the shipping documents being sent by courier service to the consignee. These shipping documents relate to both the 388 as well as the 493 cargo and the documents forwarded to the consignee included the grading summary of the timber of both the 388 and 493 cargoes. Without any doubt at all, the Consignee's reply, by fax (P16) on 12 October 1991 was in response to the said telex (P15). By their fax, the consignee asked for a new set of grading summary for both the 388 and 493 cargo and samples of the grading summary prepared by the consignee were also sent by facsimile to the plaintiff. Clearly, the documents emanating from the consignee show that the

consignee was prepared to accept the 388 cargo and thus the words, earlier referred to, must be taken to mean the 388 cargo. This means that the consignee had agreed to accept the discrepancies in respect of the 388 cargo, that is accepting the 388 cargo though it was shipped late and though the letter of credit had already expired. That was the intent of the exchanges by the telex (P13) and by fax (P14). Pornchai attempted to brush aside the said grading summary by testifying: "My employee made a mistake." He never explain how the mistake came to be made and the employee who allegedly made the mistake was not called to explain. The grading summary is a very detailed two-page document containing numerous hand-written figures relating to each of the 388 bundles comprised in the 388 cargo. Someone must have given instructions to the employee to prepare the same to replace the one the plaintiff had sent the consignee. It calls for an explanation by the consignee or Pornchai as to how and why the grading summary for the 388 cargo came to be prepared and how the "mistake" was made; there was none. I cannot, therefore, accept the assertion that there was a "mistake". The request for a new set of grading summary for the 388 cargo, coming after the plaintiff had informed the consignee that the 388 cargo had been shipped, can only be construed as conduct confirming the fact that the consignee had already agreed to accept the 388 cargo though the letter of credit had expired and the shipment was late. This would mean that the said words of the facsimile (P14) refer to the 388 cargo rather than other future shipment. I will now examine the conduct of the consignee after the receipt of the shipping documents relating to both the 388 and 493 cargo to see whether it is in the way of conclusion that the consignee had agreed to the late shipment of the 388 cargo. It will be recalled that the said documents went sent by courier service to the consignee on 10 October 1991 and Pornchai admitted receiving them. However, he denied reading the documents relating to both the 388 cargo and 493 cargo but after further questioning he admitted reading them but only the documents relating to the 493 cargo. I will pause here to remark that it is inherently improbable that anyone would read only some of the documents that were sent together with others and it had to be quite coincidence that the documents he happened to read relate to the 493 cargo and not the 388 cargo. Pornchai cannot be believed. He must have also read the documents relating to the 388 cargo. As to when he received the documents, he said he cannot remember. It is safe to assume since they were sent by courier service, that the documents were received by him the latest 12 October 1991 or else the proposed grading summary relating to the 388 cargo, which details must have been gleaned from the grading summary the plaintiff courier-delivered to the consignee, could not have been sent by facsimile, to the plaintiff on 12 October 1991. If Pornchai had not agreed to accept the 388 cargo he would have immediately protested upon receiving copies of the documents but instead he followed through by asking for a different grading summary for both the cargoes. Again, it is improbable that Pornchai would protest the shipment of the 388 cargo over the telephone, as he alleged, when he used the facsimile machine to ask for a different set of grading summary on 12 October 1991, and when he could easily have on that day also sent a facsimile to register his non-acceptance of the 388 cargo because, as I have found, he was by then already in possession of copies of the documents relating to the 388 cargo. The fact of the matter is that there was no reason to protest because he had agreed to accept the late shipment of the 388 cargo. What then of the rejection of the shipping documents which the bank in Bangkok sent to the consignee and which were rejected by them in writing (D14(b))allegedly on 24 October 1991. Pornchai did not himself reject the documents but it was his father and Pornchai was informed of the rejection. So we have no evidence as regards why the father of Pornchai rejected the documents. In any event, this has to be considered together with the events subsequent thereto. The first of which is the payment of the customs dues. The vessel had arrived at the Port of Bangkok either on 1 or

2 November 1991. The customs duties on the 388 cargo were paid by consignee but Pornchai explained that it was paid at the request of an elderly person, Poon Sri. He also said the regulation of the port authority requires the consignee to pay. The dispute concerning this payment is when was it paid. Pornchai maintained, stubbornly, I would add, that the payment was not made on 2 November 1991 despite a translation (D35(b)) of the receipt (D35(a)) adduced by the defendant which says that the tax was paid on 1 November 1991. I agree with Mr. Edwin Tsen that this is significant because it shows that the consignee was willing and happy to pay the customs duties even before the arrival of the vessel on 2 November 1991. This, of course, belies Pornchai's assertion that he did not agree to the late shipment. When Pornchai was questioned as to why paid, he at first said it was requested by Poon Sri who is an elderly person, meaning, I presume, that the elder's words have to be obeyed. But he later on proffered the excuse that he paid in order that his 493 cargo could be discharged. There was no doubt that he was very hesitant in his evidence and, when his evidence is viewed in the light of the exchanges through the telex and facsimile machines, I am left in no doubt that Pornchai could not be telling the truth in wanting to pay the customs duties for the 388 cargo. There was actually yet another reason advanced by Pornchai as to why he paid the customs duties and this was because, according to him, he was to be repaid. Pornchai referred to a receipt he issued showing the repayment. The receipt is dated 31 August 1992 (D46). It just does not stand to reason why the consignee should in the first place pay when the defendant could very well pay. There was no explanation for this course of action and there was no evidence that the defendant or Poon Sri was impecunious as to be unable to pay. Why was it only repaid on 31August 1992, almost ten months after the consignee had made payment. I am inclined to believe that this receipt (D46) was prepared for the purposes of this case and an attempt to show that the consignee was a reluctant payer of the customs duties and I am justified in coming to this conclusion in the light of the evidence I have already adverted to which clearly showed the consignee had agreed to accept late shipment of the 388 cargo.

It is not disputed that the 388 cargo was discharged onto lighters arranged by the consignee and was thereafter taken to the warehouse rented by the consignee. In the meantime, the plaintiff on 8 November 1991 received notification from their banker that the consignee had rejected the documents. The plaintiff then on 14 and 18 November 1991 exchanged telexes (P19, P20 and P21) with the agent seeking information as to whether the a bank guarantee was provided in exchange for the issuance of the delivery order without the production of the bill of lading. Not getting any positive news from the agent, David Wong flew to Bangkok and met Pornchai. It was in this meeting that Pornchai asked for a 50% discount in the price of the 388 cargo before he would cause payment to be made to the plaintiff. David Wong was taken to the warehouse where the 388 and 493 cargoes were kept. These two cargoes were all mixed up and some of the bundles were broken up. All this can be seen from the photographs (D27). When asked why the cargoes were mixed up, Pornchai apart from saying that not many were mixed up, replied that there was not enough space. The two cargoes take up the same amount of space whether you mix them up or put them separately; that cannot be the reason. Pornchai had earlier said the 493 cargo was first removed to the warehouse and thereafter the 388 cargo. If such was the case, there no reason why the two cargoes should be so mixed up unless the acceptance of the 388 cargo was not in question and hence there was no need to put the 388 cargo aside from that of the 493 cargo. The mixing up of the two cargoes provide further support for my conclusion that the 388 cargo was never intended to be rejected and that the late shipment was agreed. Pornchai obviously thought he had the upper hand since the consignee was able to reject the documents which the bank presented him for acceptance because on the face of the documents there was late

shipment and the bill of lading had expired and thus was able to avoid payment for the 388 cargo which he had accepted and arranged for delivery to the warehouse. It was because Pornchai was in that seemingly advantageous position that he dared ask for a 50% discount in the price before he would cause the consignee to pay the plaintiff. So much for Pornchai. I will now turn to Poon Sri.

It was David Wong's allegation that while in Bangkok he, after meeting Pornchai, called Poon Sri to find out whether there was any guarantee given for the release of the 388 cargo to the consignee and that Poon Sri was alleged to have replied in the affirmative. It will be recalled that immediately upon his return to Singapore, David Wong sent two notes (P23 and P24) by facsimile to the agent to ask for a copy of the guarantee which Poon Sri was alleged to have told him was procured. Poon Sri denied there was such a conversation between her and David Wong. Since the contemporaneous document, especially the facsimile P23 tends to support, I am inclined to believe David Wong that there was in fact such a conversation where Poon Sri had told him that she had the guarantee for the 388 cargo. As it turned out, there was no such guarantee. The agent finally replied the deluge of telexes from the plaintiff by the facsimile dated 5 December 1991 (P29(a)). It appears, from the exhibit P29(b), that the defendant had on 4 December 1991 by facsimile sent to the agent four photographs and stating that the 388 cargo had been stored at the godown of the consignee. This facsimile (P29(b))was sent to the plaintiff on 5 December 1991. Poon Sri denied that it was sent by her instruction but she could not explain how it could have been sent and by whom through a facsimile machine of the defendant. Thus, I do not see how Poon Sri could deny the existence of the facsimile (P29(b)) and that it was sent by the defendant. As for the alleged conversation between Poon Sri and Pornchai where she allegedly requested Pornchai to pay the customs duties, I find Poon Sri's evidence unsatisfactory and cannot be accepted. Not even an approximate date was given as to when the conversation took place. It is unbelievable that an owner of the vessel would herself personally call the consignees when she had at her disposal 10 staff. She also contradicted herself when she in one breadth said she did not call the other two consignees other than the consignee and than in the next breadth said she also called the other two consignees. There are other areas of her evidence which demonstrate her unreliability as a witness. With regards to the facsimile machine, she at first denied having one but later confessed to owning one after being confronted with the allegation of Pornchai that he had sent her a facsimile of the charges. When asked whether a certain delivery order no. 2 was for the 388 cargo since the delivery order no. 1 was issued for the 493 cargo and the delivery orders no. 3 and 4 were for the other two consignment shipped on the vessel, she replied that the delivery order could not be issued because there was no bank guarantee and thus implied that the delivery order for the 388 cargo was not issued. If what she implies is true, how could the 388 cargo be delivered to the consignee without a delivery order. It is reasonable to infer from the numbering of the delivery orders that the number 2 was for the delivery order in respect of the 388 cargo and must have been issued. This means Poon Sri's evidence is, again, suspect, more due to her faulty recollection of the events than deliberately lying, in deference to her riposte, during her evidence, that old people do not lie. There were a lot of other documents, for example, exhibits D32, D33 and D34, that were issued months after the event to serve the present litigation and they were obviously prepared for the purpose of this case and are therefore of no value. They are not proof of what was the true position at the respective time of the various events. I have therefore disregarded them. There is therefore no truth in Poon Sri's assertion that the customs duties were paid by the consignee on her behalf and which she later disbursed the consignee. In this respect, I again agree with Mr. Edwin Tsen that something of this importance, like the request for payment and the agreement to disburse, would surely be

reduced in writing and there was none. This again casts serious doubt on the truth of such assertion. Another piece of evidence that tends to support the fact that the 388 cargo was infact delivered to the consignee was in the facsimile containing the photographs (P29(b)) where it is stated that the 388 cargo was at the godown of the consignee rather than being at the warehouse. The contemporaneous documents just do not support her assertions.

To recap, I find that the 388 cargo was delivered to the consignee without the production of the bill of lading. I also find that there was no demand, be it oral or in writing, by the plaintiff for the return of the 388 cargo. In this aspect of the evidence, David Wong vacillated between asserting he had and he had not demanded. Since it is in his character to reduce whatever was in his mind into writing, as shown by the written communications with which he deluged the agent, it is reasonable to conclude that if the plaintiff had really made a demand for the return of the 388 cargo, this would surely have been reflected in a written document and since there was none, it can be taken that the plaintiff had not demanded for the return of the 388 cargo.

Another area of contention is the question of whether it is the practice that the customs duties and all the cargoes in the vessel must be paid before any of the cargoes can be discharged. For this purpose, the defence called Samrit Sookgaree whose evidence I had referred to briefly but which I will now advert to in more detail. He testified that he had more than 37 years' working experience with the Thailand Port Authority and is presently the Deputy Director of Cargo Operation Department. He was in 1991 the Director of Warehouse. He testified that the normal procedure for discharging timber cargo at the Bangkok Port is at midstream because of congestion in the wharf. Permission must first be obtained from the port authority before cargoes can be discharged at midstream and he went on to describe the various steps to be taken in applying for permission for midstream discharge. He testified that if the customs duty on any one consignment is not paid, the rest of the consignment cannot be discharged. He was shown the application of the defendant for midstream discharge dated 31 October 1991 (D26), the translation of which reads:

> Bangkok Port
> Port Authority of Thailand
> No. C2-314
> Date 31 October 1991
> Time 10.50 a.m.
>
> Tavee Thong Marine Co., Ltd.
> o. 1575/127-128 Soi Ruamchoke Charoennakoun Road,
> Klongsan, Bangkok Thailand.
> Telephone 437-1130, 437-7676 Cable Address "POONSRI BANGKOK"
> **Faz: No. (662)4372053**
>
> Date: 31 October 1991
>
> Re: Requesting permission for overside discharge into barges at Rat Burana Midstreams
>
> Attention: Director of Imported Cargo Control and Inspection Division 1./Director of Port of Bangkok.
>
> The company had been the shipping agent for the ship "TAVEECHAI MARINE' arriving on the 2nd of November 1991. The said ship of the company came from Malaysia to discharge imported cargoes and to load exported cargoes. On such a voyage the ship had on board cargoes of sawn timber of 1,616 bundles, weighing about 1,176.9665 tons; all of which are intended by the company to be overside discharged into barges at Rat Burana Midstreams.
>
> The company hereby extends its request to you to Kindly permit the said ship of the company to discharge her cargoes overside into barges at Rat Burana Midstreams on 2 November 1991.

The company would very much appreciate your permission.

All charges of any descriptions will be paid by the following cargo receivers, namely:

1. M/s Young Sawatt Wood Supply Co., Ltd. 493 Bundles
   419.7105 Tons.
2. M/s Yong Sawatt Wood Supply Co., Ltd. 388 Bundles
   289.8588 Tons.
3. M/s Siam Crate Co., Ltd. 181 Bundles
   79.2442 Tons.
4. M/s Timber Impex Co., Ltd. 554 Bundles
   388.1530 Tons.

Should any difficulties may arise therefrom the company will definitely take full responsibility thereof.

Yours Faithfully,
Tavee Thong Marine Co., Ltd.

..... (Signed)
(Mr. Tamnool Nitswaeng)
As Agents

To: Director of Imported Cargo Control and Inspection Division 1.

The above mentioned request made by the company has been considered and approved by the Port Authority. Formalities shall be carried out at the Transit Shed No. **3(three)**

..... (Signed)
On Behalf of the Director of Bangkok Port
1 Nov. 91

To: Customs Officer at the TRANSIT SHED No **8 (eight)**

Overside discharge of the cargoes persuant to the request has been permitted, provided it shall be done upon receiving of the completely cleared and paid-up importer' entries by the Inspector attached to the ship. The Division has permitted overside discharge into barges to be done at Rat Burana Midstreams and Controlling and Supervision Officials for releasing (of the cargoes) will be provided accordingly.

.....(signed)
On Behalf of the Director Imported Cargo
Control and Inspection
Division 1.

and he explained that the application had to go through the port authority and the customs. When questioned as to which law which says that duties must be paid on all the cargoes before any of them can be discharged, he said the law is stated in last s. (D26(d)) of the letter (D26) which I have just reproduced and he added, I quote, "It is in the instruction to the customs officer." He was then referred to s 11 of The Customs Law B.E. 2469 of Thailand which says:

Before any goods shall be unshipped from any ship, the importer shall lodge an entry with the Competent Officer, in such form and with so many duplicates as the Director-General may require, and shall pay the duty, if any, leviable upon such goods, or shall, if the Competent Officer so directs, deposit a sum as security for such duty.

The Director-General may allow, subject to such conditions as he may deem fit, unshipment of any goods upon a Bill of Sight hereafter provided, or upon the request of the master or agent of the importing ship.

Provided that no entry shall be required in respect of the baggage of passengers, which may be examined, landed and delivered under such regulations as the Director-General may prescribe.

and then questioned as follows:

Q: [Witness shown D17 (a)]. Section 11 does not say all duties must be paid before goods can be discharged from the ship?
A: Normal goods yes, but not timber.

Q: Where is the law to say that customs duties must be paid on all the consignment before any or all of them can be discharged?
A: The law is stated in D26(a).

Q: Which part of D26?
A: At D26(d). It is in the instruction to the customs officer.

Q: Have you seen this D26 before?
A: Yes, I have signed this type of letter before. I did not sign this letter.

Q: What will happen if vessel arrived at Port of Bangkok and nobody claims the goods, what will happen to these goods?
A: Must apply for berth application. The goods will remain on the vessel.

Q: How long can they remain on the vessel?
A: It depends on the type of goods.

Q: What is the maximum number of days a ship is allowed to anchor at the port?
A: It depends on amount of the goods.

Q: Full load of cargo, how long is the ship allowed to remain?
A: Allowed until the goods are discharged.

Q: Are you familiar with the customs law of Thailand?
A: I know the relevant law.

Q: Which is the Thai law that makes the distinction between timber cargo and others?
A: I cannot remember.

Put: There is no such law that provides such a distinction between timber cargo and others.
A: I cannot remember.

Put: Comparing s. 11 with D26(d) the words used in the letter are consistent with s. 11.

Court: Leave that to submission.

Q: Are you aware of s. 43 and s. 44 of the Customs Act?
A: I cannot remember what the sections say.

Q: Section 43 says if goods uncleared after 10 days can be removed and taken to the custody of the customs and kept in a place of security at the owners expense - do you agree with that?
A: There is such law.

Q: Section 44 - uncleared goods ship beyond 21 days may be detained at the expense of any importing ship?
A: I agree that is the law.

Are those, then, evidence sufficient to establish, whether as a matter of practice or as a matter of law, that the duties on all the cargoes must be paid before any cargo can be discharged? If that is the law of Thailand, it should be easy enough to establish by referring to the statute or the subsidiary legislation itself. But this witness cannot point to any such law, not even Ms Kathryn Leong. One can safely conclude that there is no such law. Are

the evidence then, sufficient for establishing that there is a such a practice? But first, let me determine whether there could be such a practice? Let me take the example of one consignee who is not a friend of the shipowner and who refused that cargo and refused to pay customs duties amounting to RM500,000. If there is such a practice, it means that the shipowner would have to pay RM500,000 before all the cargoes can be discharged. One cannot imagine any shipowner surviving long if it has to operate under such conditions. What happen if there is more than one consignee who refuses the consignment and who refuses to pay - the shipowner or charterer could easily be in financial ruin. One cannot imagine there being such a draconian law and that is why the defence cannot point to any law of Thailand which lays down such a condition. This leads me to ask how could it be true that the collection of revenue (customs duties) of the Government of Thailand is governed, not by laws or regulations, but, "by practice" - it is just not possible. Even assuming that there is such a "practice", does that mean that the defendant has to follow it. First, what is a "practice" and this is what **Sarkar on Evidence**, 14th edn, p.237, says:

> A practice is a succession of acts of a similar kind or in a like employment [Webster's Dictionary]. Practice may be more or less common, but it does not become a custom unless it is consciously accepted having the force of law...

No evidence was adduced as to the number of occasions where this 'practice" was imposed on the shipowners or charterers. By Poon Sri's own admission, she had not for 20 years, until this case, encountered the problem of a consignee not taking the cargo and therefore there was no occasion for her to experience her ship not being able to unload because all the customs duties were not paid. Samrit Sookgaree also could not point to any specific occasion where this practice was employed. Unless such a condition was employed to enforce payment of the customs duties on successive occasions, it cannot become a practice. Since there is no such evidence, such a practice was not proved. It would have been beyond argument that there cannot be such a practice if one is allowed to advert to ss. 43 and 44 of the Customs Law, B.E. 2469 of Thailand, assuming that there is such a law, because they made provisions for discharging of cargoes where the customs duties have not been paid. But this legislation was not proven in accordance with s. 78(1)(f) which requires the legislation to be proved:

> by the original or by a copy certified by the lawful keeper thereof, with a certificate under the seal of a notary public or of a consular officer of Malaysia that the copy is duly certified by the officer having the lawful custody of the original and upon proof of the character of the document according to the law of the foreign country.

It does not matter because for the reasons I have mentioned earlier, I am of the view that there was no such practice. If it is meant to be asserted by the defence that such a practice has the force of law, it is even less proven because an expert on Thai law should have been called by the defence, since they carry the burden of establishing such a "practice", to give evidence as allowed by s. 45 of the Evidence Act, 1950 but this was not done. In fact, the trial was earlier in the year adjourned expressly for the purpose of allowing the defence to call a certain Thai customs officer knowledgeable in the customs law to give evidence. Despite the adjournment, this customs officer did not come forward.

Having established the truth of this case, I will now turn to the law as regards the position of the parties. More findings of fact will be made later as I proceed to give my verdict.

Questions of Law

Could the plaintiff succeed on their claim based on conversion? Ms Kathryn Leong submitted that the plaintiff cannot succeed because no demand was made for the return of the 388

cargo which demand, according to learned Counsel, is a pre-requisite for an action based on conversion and she referred to *Si Khiong Industries Sdn Bhd v. Liau Shu Chau (Trading as Syarikat Maju Jaya Agency)*[1993] 1 AMR 779; [1993]4 CLJ 468, *Abdul Muthalib bin Hassan v. Maimoon bte Haji Abd. Wahid* [1992] 1 CLJ 88 and **Clerk & Lindsell on Torts**, 17th edn, at p. 645, para. 1091 and p. 646, para. 1094, as supporting that proposition of law. Mr. Edwin Tsen does not agree and I will return to the two cases after I have referred to the laws relating to conversion. There are three forms of conversion. See **Halsbury's Laws of England**, 4th edn, vol.45, para.1422. The first form of conversion consists of a positive wrongful act of dealing with the goods in a manner inconsistent with the owner's rights, and an intention in so doing to deny the owner's rights or to assert a right inconsistent with them. The second form of conversion consists of a wrongful detention of goods and the normal method of establishing a wrongful detention is to show that the plaintiff made a demand for the return of the goods and that the defendant refused after a reasonable time to comply with that demand. The third form of conversion consists of a loss or destruction of goods which a bailee has allowed to happen in breach of his duty to his bailor.

As for *Abdul Muthalib bin Hassan v. Maimoon Bt Haji Abd. Wahid* and particularly the passage of **Clerk & Lindsell on Torts**, 13th edn, at p. 645, para. 1091, cited therein, viz:

> There can be no right of action unless the demand was brought to the knowledge of the defendant before the issue of the writ.

I am of the opinion the case and the passage just quoted was decided and said in relation to conversion by unlawful retention of property which is the second form of conversion which I have adverted to earlier. In *Clayton v. Le Roy* [1911] All ER 284, the writ was issued before any wrongful refusal by the defendant to return a watch and it was held there was no conversion. *Abdul Muthalib bin Hassan v. Maimoon Bt Haji Abd. Wahid* concerns the wrongful retention of personal property. Whereas the present case concerns the wrongful delivery of a cargo to a consignee who did not produce the bill of lading. As for *Si Khiong Industries Sdn.Bhd v. Liau Shu Chau (Trading as Syarikat Maju Jaya Agency)*, the facts are also different from the present case. That was a case where the surety seized the vehicles, the subject-matter of a pledge, before the surety had paid the creditor and selling them after the surety had paid off the creditor and when the vehicles were seized, the debtor made no demand for their return. The facts of those cases are therefore readily distinguishable from the present case. Nevertheless, I now have reservations in applying the principle to that case because by the time that writ was issued in that case, the vehicles were already sold and it was obvious that a demand for the return of the vehicle would not be complied with because it could not be complied with. In *Baud Corpn. NV v. Brook* (1974) 40 DLR (3rd) 418 (Alta. App. Div.), (a case referred to in footnote 9 to para.1430 of Halsbury's Laws of England), it was held that proof of demand and refusal may be unnecessary in an action for retinue where the defence discloses such an adverse claim to that of the plaintiff that it is obvious that any demand would have been refused. In any event, I am of the view that it is not every form of conversion that a demand is necessary. This is clear from the following passage of **Halsbury's Laws of England**, 4th edn, vol.45, para.1430:-

> Conversion may be established by methods other than demand or refusal, even where goods are detained, but in most cases a refusal will constitute the best means of establishing a conversion of goods withheld by the defendant. A demand and refusal is sufficient evidence of conversion only if at the time of the demand the party who refuses has it in his power to deliver up the article in the condition in which the article is demanded. However, if the party has wrongfully parted with the article, the wrongful parting will in itself have constituted a conversion.

I therefore agree with Mr. Edwin Tsen that a demand for the return of the 388 cargo is not necessary in this case because it is the plaintiff's assertion that the defendant is no longer in possession of the 388 cargo and that the 388 cargo was already delivered to the consignee resulting in the plaintiff being in a position to exercise an option either to sue the defendant for conversion or the consignee for goods sold and delivered. This is how Bankes LJ puts it in *Verschures Creameries, Ltd. v. Hull and Netherlands Steamship Company, Ltd.* [1921] 2 KB 608, at p. 610-611, *viz*:

> This is an attempt to blow hot and cold, as Lord Esher used to say (1), or to approbate and reprobate, the language of others. A quantity of margarine belonging to the appellants was dispatched from Holland on board the respondents' vessel consigned to one Beilin in Manchester. For some good reason the appellants desired that this margarine should not reach Beilin, so they instructed the respondents, who were acting as carriers of the goods, to hold them at Hull and await further orders. The respondents acknowledged and accepted this order, but nevertheless they delivered the goods to Beilin. When the appellants discovered this they had a right to elect; they might refuse to recognize the action of the respondents in delivering the goods to Beilin and sue them for conversion or breach of duty, or they might recognize and adopt the act of the respondents and sue Beilin for goods sold and delivered. They elected to take the latter course, and they sued Beilin to judgment. Having elected to treat the delivery to him as an authorized delivery they cannot treat the same act as a misdelivery. To do so would be to approbate and reprobate the same act...

The defence that the action cannot succeed because there was no demand for the return of the 388 cargo therefore fails. But Ms Kathryn Leong went on to submit, and I quote,:

> ...there was no dealing with the goods inconsistent with the rights of the owner by the defendants. There was no intention on the part of the defendants to appropriate the goods but as provided by customary practice to land the goods into the warehouse safeguarding the interest of the Plaintiffs. There was further no refusal on the part of the defendants to return the goods and on three occasions request has been made to plaintiffs to take the goods but the latter failed to do so.....

In the present case it is my conclusion that the defendant had delivered to the consignee the 388 cargo without the production of the bill of lading or a guarantee for payment in lieu thereof. The consignee was only entitled to take delivery if he had obtained the bill of lading which entails accepting liability to pay for the 388 cargo and which payment will be by way of the letter of credit which had already been opened by the consignee in favour of the plaintiff. Until the consignee agrees to accept the bill of lading and thus agrees to pay, the 388 cargo should not be delivered to the consignee. The defendant had by the bill of lading agreed not to deliver to the consignee unless the consignee produce the bill of lading. In delivering the 388 cargo to the consignee when the consignee was not enttiled to take delivery of them because the consignee did not produce the bill of lading, the defendant was guilty of conversion (**Halsbury's Laws of England**, 4th edn, vol.45, para.1430 and **Carver's Carriage By Sea**, 13th edn, vol. 1, p.97, para.129). It will be recalled that it is the Defendant's case that the consignee had refused to accept the 388 cargo because of late shipment and because the letter of credit had expired forcing them to deliver the 388 cargo to the warehouse. I have already set out my reasons for concluding that the consignee had agreed to accept late shipment and to accept the documents with their discrepancies. All the evidence points to the fact that the 388 cargo was delivered to the consignee after the consignee had arranged for lighters to carry the 388 cargo from midstream and therefore arranged for vehicles to carry the 388 cargo to the warehouse which was completely under the dominion and control of the consignee. The photographs produced in Court support the conclusion that the consignee was already dealing with the 388 cargo since some of the bundles were already

broken up and mixed with the 493 cargo and lorries were seen carting away the sawn timber. The evidence, therefore, cannot support the contention of the defendant that the 388 cargo was at that time and still is being safeguarded by the defendant. There is also the evidence of the payment of the customs duties by the consignee which one hardly expects of a consignee who had refused a consignment and the 388 cargo could only have been landed after the necessary customs declarations had been made and these must have been made by the consignee which puts paid to any pretence that the consignee did not want to accept 388 cargo. When Pornchai gave evidence, he asserted that the payment of the customs duties, the hiring of the lighters and the payment of the renting of the warehouse were all done at the behest of Poon Sri yet not one contemporaneous document could be produced to support that fact. For example, if Poon Sri had requested the consignee to pay the customs duties with a promise to repay, there surely must be a document to evidence a matter of such importance; there was none. It is the same with the hiring of the lighter and the renting of the warehouse. Yet months afterwards, that is allegedly on 27 August 1992 (D33), the defendant was allegedly billed for use of the warehouse. Unbelievably and also on the same date, the consignee also begins to document (D34) the alleged arrangement between the defendant and the consignee. These self-serving documents are a pathetic attempt to lend strength to what Pornchai and Poon Sri are going to testify in Court. It is an undisguised attempt at orchestration of the evidence to be given and this attempt is another reason why I find it difficult to accept the evidence of Pornchai and Poon Sri.

If intention is an ingredient for the tort of conversion, then from the facts I have adverted to, the intention can be inferred. There was no way in which the 388 cargo could find its way into the warehouse unless it was with the permission of the defendant. The defendant must have intended that the consignee should take delivery of the 388 cargo which adversely interfered with the rights of the plaintiff to the 388 cargo. In such an event, to quote from **Palmer on Bailment**, 2nd edn., at p. 213, an authority cited by Ms Kathryn Leong,:

> ...liability may therefore be incurred innocently; conversion does not depend upon any deliberate or malicious abjuration of the plaintiff's title, nor is it excluded by any permission given to the converter by a third party (whether an intermediate possessor or an owner with no right of immediate possession), to deal with the goods in the matter complained of. The key to this strict liability may be found in the function of conversion as an instrument for the protection of ownership. Because of this, "question as to the fault of the defendant are irrelevant, the principle adopted being that 'person deal with the property in chattels or exercise acts of ownership over them at their peril'. The rule is a harsh one and cruel cases abound.

Whatever may be the reason for the defendant to deliver the 388 cargo to the consignee, it does not absolve the defendant from liability if it had adversely affected the rights of the plaintiff which is the case here.

What then of the offers of the defendant to return the 388 cargo to the plaintiff? The first of such offer appears to be in the letter of 26 December 1991 issued by the defendant's advocate to the plaintiff's advocate (D28) in which letter there was also alleged that the 388 cargo "was never at any time released to the consignees". Before that, there was none and in fact, Poon Sri has in her evidence said that she did not contact the plaintiff to inform the plaintiff that Pornchai had rejected the documents but she said in cross-examination that she told the agent to inform the plaintiff. There is no evidence that the agent had informed the plaintiff of the rejection. Surely, if the defendant was put in such a quandary on account of the alleged refusal of the consignee to accept the 388 cargo, as Poon Sri wants us to believe, the defendant would surely have communicated in writing with the plaintiff to get instructions as to what to do with the 388 cargo. Poon Sri at first said there was no facsimile machine

but later said there was one but in the end she never explained why the defendant did not communicate with the plaintiff or why the defendant did not ensure that the agent had communicated with the plaintiff, assuming for the time being that Poon Sri had instructed the agent to do so. The failure can only be explained by the non-existence of any protest by Pornchai regarding the 388 cargo which means that there was no occasion to communicate and hence no such communication. As for the letter, when the opportunity presented itself it failed to state, apart from saying that the 388 cargo was kept at the warehouse, why it was kept there. If the consignee's refusal to take the 388 cargo was the reason, it would surely, at that first available moment, have been stated. That it was not done belies the allegation and contention that the 388 cargo was sent to the warehouse for safekeeping. The customs declarations were done by, the customs duties and the lighterage were paid by and the rental of the warehouse was done by the consignee, all of which would not be the case if the consignee was not willing to accept the 388 cargo. The warehouse also happens to be the warehouse for the consignee's 493 cargo. These events, together with the photographs showing the mix-up of the timber of both the 388 and 493 cargo, also support the conclusion that there was in fact delivery of the 388 cargo to the consignee. All the circumstances fit the description of delivery in **Julian Cooke & Ors on Voyage Charters**, at p.142, viz.:

> What constitutes delivery
>
> It has been said that delivery occurs when "the goods are so completely under the control of the consignee that he may do what he likes with them" *(British Shipowners v. Grimond* (1876)3 Rett.968, 972), or when they are "placed under the absolute dominion and control of the consignees" *(Chartered Bank v. British India S.N.Co*. [1909] AC 369, 375).

There are other contentions advanced by Ms. Kathryn Leong but they were very much dependent on a finding of facts favourable to the defendant but which I had found otherwise and they, as a result thereof, do not fall to be considered any more. There was a reliance on Article IV, Rule 2(g) of the Merchant Shipping (Implementation of Convention Relating to Carriage of Goods by Sea and To Liability of Shipowner & Other) Regulations 1960 which says: "Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from any other cause arising without the actual fault or privity of the carrier or without the fault or neglect of the agents or servants of the carrier.." as a defence bur Ms Kathryn Leong in her closing speech though she did not advert to it she also did not say the defence was abandoned. In any event, I have already found fault on the part of the defendant and this Article cannot be relied on as exempting the defendant from liability. I agree with Mr. Edwin Tsen that the contract made between the parties cannot be interpreted so widely as to exclude the liability of the defendant for their own fault. See *Sze Hai Tong Bank Ltd v. Rambler Cycle Co. Ltd.* [1959] AC 576 where it was also held that a shipowner who delivers without production of the bill of lading does so at his peril and that in delivering the goods without production of the bill of lading to a person who, to its knowledge, was other than the one entitled under the bill of lading to receive them, was liable for breach of contract and for conversion.

The final contention of Ms Kathryn Leong is that, in any event, the liability of the defendant is only RM329,800 which is worked out at 388 bundles multiplied by RM850 and this limitation is found in clause 2(a) of the bill of lading, the relevant part of which says:

> ...(a) so long as the goods remain in the actual custody of the carrier or his servants (otherwise than as mentioned in sub-clause (b) hereof), the carrier shall not be liable for loss damage or detention arising or resulting from the act neglect or fault of the

servants or agents of the carrier nor from any other cause whatsoever arising without the actual fault of privity of the carrier nor in any event for an amount exceeding the declared value of goods paying freight on ad valorem basis or the invoice value whichever shall be least or in the case of other goods the invoice value of stirling pounds 100 per package or unit or sterling pounds 25 per cubic foot or half hundredweight, whichever shall be least...

Mr. Edwin Tsen's reply is only in one short sentence, *viz*.:

> This defence cannot sustain in the light of the decision of *Sze Hai Tong's* case, at it was never intended to give an absolute limitation exclusion of liability.

Mr. Edwin Tsen did not say whether the facts of this case come within the ambit of this clause, particularly, whether or not the 388 cargo was at the relevant time "in the actual custody of the carrier or his servants" because the exemption clause only applies if that condition is satisfied. Ms. Kathryn Leong is not contending that the defendant is totally exempted from liability which was the contention in *Sze Hai Tong Bank Ltd v. Rambler Cycle Co. Ltd.* The plaintiff's claim, it will be recalled, is for the sum of RM388,410.80. It is contended that, because of clause 2(a) of the bill of lading, the liability is limited to the amount of RM329,800. The rationale behind *Sze Hai Tank Bank Ltd v Rambler Cycle Co. Ltd*, a case relied on by Mr. Edwin Tsen, is stated, at p.586-587, in these terms:

> In order to escape the consequences of the misdelivery, the appellants say that the shipping company is protected by clause 2 of the bill of lading, which says that: During the period before the goods are loaded on or after they are discharged from the ship on which they are carried by sea, the following terms and conditions shall apply to the exclusion of any other provisions in the bill of lading that may be inconsistent therewith, *viz*., (a) so long as the goods remain in the actual custody of the carrier or his servants (here follows a specified exception); (b) whilst the goods are being transported to or from the ship (here follows another specified exception); (c) in all cases the responsibility of the carrier, whether as carrier or as custodian or bailee of the goods, shall be deemed to commence only when the goods are loaded on the ship and to cease absolutely after they are discharged therefrom.
>
> The exemption, on the face of it, could hardly be more comprehensive, and it is contended that it is wide enough to absolve the shipping company from responsibility for the act of which the Rambler Cycle Company complains, that it to say, the delivery of the goods to a person who, to their knowledge, was not entitled to receive them. If the exemption clause upon its true construction absolved the shipping company from an act such as that, it seems that by parity of reasoning they would have been absolved if they had given the goods away to some passer-by or had burnt them or thrown them in to the sea. If it had been suggested to the parties that the condition exempted the shipping company in such a case, they would have said: "Of course not." There is, therefore, an implied limitation on the clause, which cuts down the extreme width of it: and, as a matter of construction, their Lordships decline to attribute to it the unreasonable effect contended for.
>
> .....If such an extreme width were given to the exemption clause it would run counter to the main object and intent of the contract .....
>
> To what extent is it necessary to limit or modify the clause? It must at least be modified so as not to permit the shipping company deliberately to disregard its obligations as to delivery... No Court can allow so fundamental a breach to pass unnoticed under the cloak of a general clause; see *The Cap Palos*.

It is important to bear in mind that, broadly, there are three categories of exemption clauses *viz*.:

(1) Clauses which purport to limit or reduce what would otherwise be the defendant's duty, for example, by limiting liability to cases of wilful neglect or default;

(2) Clauses which purport to exclude or restrict liability which would otherwise attach to a breach of contract, such as liability to be sued for breach or be liable in damages; and

(3) Clauses which purport to exclude or restrict the duty of the party in default fully to indemnify the other party, for example, by limiting the amount of damages recoverable against him

(See **Chitty on Contracts**, 26th edn, vol.1, at para.943.)

Sze Hai Tong Bank Ltd v Rambler Cycle Co. Ltd. concerns an exemption of the category (2) whereas the exemption clause of this case concerns category (3). This difference is important because it was held in *Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd and another* [1983] 1 All ER 101 that:

> The issue of whether a condition in a contract limiting liability was effective depended on the construction of the condition in the context of the contract as a whole. Furthermore, although a limitation clause had to be clearly and unambiguously expressed in order to be effective and was to be construed *contra proferentem*, the relevant words were, if possible, to be given their natural, plain meaning. Thus a limitation clause was not to be construed as rigidly and strictly as an exclusion clause since an agreed limitation of liability was more likely to accord with the true intention of the parties (having regard to the amount of the potential loss in relation to the sum paid for the service contracted to be rendered) than an exclusion of all liability.

In the present case, the freight was RM22,898.85 (D8) whereas the potential loss was RM388,410.80. In the event, the limited loss amounted to RM329,800. The freight was less than 6% (5.895%) of the value of the cargo. This limitation must surely have been intended by the parties and must therefore be given their plain and ordinary meaning. Since the limitation is not a clause excluding all liability it cannot be regarded as unreasonable or counter the object or intent of the contract. I therefore hold that the limitation clause is valid and if it does apply it means the amount of damages recoverable by the plaintiff would only be the sum of RM329,800. But, as I mentioned earlier, the operative words for this clause to apply are: "so long as the goods remain in the actual custody of the carrier or his servants". I have found as a fact that the 388 cargo was no longer in the actual custody of the defendant nor with their servant. The 388 cargo was in fact already delivered to the consignee. Hence, I agree with Mr. Edwin Tsen that this clause cannot be called upon by the defendant to limit its liability but not on the authority of *Sze Hai Tong Bank Ltd v Rambler Cycle Co. Ltd.* rather on *Ailsa Craig Fishing Co Ltd v. Malvern Fishing Co Ltd and another.*

Conclusion

I therefore order that judgment be entered for the plaintiff for the sum of RM388,410.80 together with interest at the rates prayed in the statement of claim. The prejudgment rate of interest shall be 4% per annum from 2 November 1991. The counterclaim of the defendant is dismissed. Costs to the plaintiff to be taxed.